

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





To be Argued by:  
Gustave J. DiBianco  
Estimated Time: 20 minutes

**Docket No. 77-1491**

In The  
**United States Court of Appeals**

For the Second Circuit

UNITED STATES OF AMERICA,

*Appellee,*

— v —

JAMES W. McGRATH, JON N. ENGLISH and RAYMOND  
D. MASCIARELLI,

*Appellants.*

On Appeal From The United States District Court  
For The Northern District of New York

**BRIEF FOR APPELLEE,  
United States of America**

GEORGE H. LOWE  
United States Attorney for the  
Northern District of New York  
GUSTAVE J. DI BIANCO  
Assistant United States Attorney  
Room 369, Federal Building  
100 South Clinton Street  
Syracuse, New York 13260  
(315) 423-5165 FTS 950-5165  
*Attorneys for Appellee*

Daily Record Corporation  
Rochester New York

(1256)

Spaulding Law Printing  
Syracuse, New York





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In The  
**United States Court of Appeals**  
For the Second Circuit

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UNITED STATES OF AMERICA,

Appellee,

-v-

JAMES W. MC GRATH, JON N. ENGLISH  
and RAYMOND D. MASCIARELLI,

Appellants.

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BRIEF FOR APPELLEE,  
United States of America

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STATEMENT OF THE ISSUES

- I. Whether the trial court was correct in denying appellants' various motions to dismiss based upon alleged violations of their statutory and constitutional rights to a speedy trial.
- II. Whether the trial court was correct in ruling that the search warrants were valid because the Hazelwood affidavit was sufficient.
- III. Whether the trial court was correct in denying appellants' motions to suppress the wiretaps based upon alleged delays in sealing those wiretaps.
- IV. Whether the trial court was correct in denying appellant McGrath's trial motion concerning the playing of selected portions of tape recordings.



### STATEMENT OF THE CASE

The appellants (and seven other defendants)<sup>1</sup> were indicted on November 18, 1974 in two counts of a three-count indictment for conducting an illegal gambling business, in violation of Title 18, U.S.C., §1955 (Count I), and conspiring to do so, in violation of Title 18, U.S.C., §371 (Count II). A third count of the indictment did not pertain to appellants but rather only to one of the ten defendants named in Counts I and II and the eleventh defendant named only in Count III (J A 1)<sup>2</sup>. A second indictment, naming only two defendants, Masciarelli and Shultz, and charging a violation of Title 18, U.S.C., §134 was also returned that day (J A 4). Appellants were arraigned on December 10, 1974.

Following arraignments, Judge Edmund Port ordered, inter alia, pretrial disclosure of the names of the Government's witnesses. The Government appealed from that order and this Court's reversal became effective in March of 1976 (J Br. 5). United States v. Cannone, 528 F.2d 296 (2d Cir. 1975). (Rehearing denied February 17, 1976.) During the appeal to this Court, all proceedings were stayed.

- 
- 1 Of the seven other defendants in Counts I and II, Cannone, Reppucci, Gaetani and Maruca pled guilty and were sentenced on January 10, 1977. The charges against Santacrose, Quinlan and Abbadessa were dismissed during 1975 and 1977, respectively.
  - 2 Herein, the following abbreviations will be utilized. The numbers following the abbreviations refer to the page of the document.

J A refers to Joint Appendix for Appellants  
J Br. refers to Joint Brief for Appellants

Gov A refers to Government's Appendix



On November 11, 1976, Judge Port dismissed the indictment against Masciarelli in the companion case, 74-CR-144 (J A 4). This Court reversed in United States v. Masciarelli, 558 F.2d 1064 (2d Cir. 1977).

Following numerous motions and extensive evidentiary hearings on various issues, the case against appellant McGrath was severed and proceeded to trial before a jury during May of 1977. He was found guilty on both counts. During June of 1977, appellants Masciarelli and English entered into a stipulation with the Government (J A 7) preserving their right to appeal pretrial rulings, and entered guilty pleas to an information charging a violation of Title 18, U.S.C., Section 1084(a).

Appellant McGrath was sentenced to probation for two years and completed same in June of 1979. Appellants English and Masciarelli were each sentenced to imprisonment for three months and fined \$500.00. Imposition of sentences for Masciarelli and English was stayed pending outcome of this appeal.

#### STATEMENT OF FACTS <sup>3</sup>

Following an FBI investigation of alleged illegal gambling activities in the Binghamton, New York area during late 1973 and early 1974, the Government applied for and received three court orders to wiretap five telephones.

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<sup>3</sup> We have purposely abbreviated this statement in view of the guilty pleas entered by appellants Masciarelli and English and in view of the very narrow issue raised by McGrath on this appeal.



The wiretaps were conducted during the period from March 6 through May 13, 1974. During June of 1974, Special Agent Roy Hazelwood of the FBI applied for and obtained warrants to search five locations at which the gambling business was being conducted.

The investigation disclosed the existence of a large scale and well organized gambling operation. During one five day period, for example (April 11-15, 1974), on two of the intercepted telephones, there were more than 400 bets placed with a dollar value exceeding \$50,000.00. (Fifth Day Report, MP-16, p. 4.) Evidence resulting from the five wiretaps was presented to a grand jury which returned the indictment in this case (74-CR-142) on November 18, 1974. A second indictment naming Masciarelli and charging a violation of Title 18 U.S.C. §1084 was also returned that day.

The facts, as they are relevant, are further discussed in the arguments which follow.



POINT I

IT WAS NOT ERROR FOR THE TRIAL COURT TO DENY  
APPELLANTS' MOTIONS TO DISMISS BASED UPON  
ALLEGED VIOLATIONS OF THEIR STATUTORY AND  
CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL

A. THE REQUIREMENTS OF THE PERTINENT STATUTORY SPEEDY TRIAL  
PLANS WERE MET

We respectfully submit that the appellants' time computations, as set forth on a chart at pages 56-57 of their Joint Appendix, and as discussed in their Brief, are grossly inaccurate. In addition, the chart does not correctly reflect the various speedy trial plans that were in effect in this District during the pertinent time periods.

During 1974, 1975, and up to July 1, 1976, there were two speedy trial plans in effect. These were the "Plan for Achieving Prompt Disposition of Criminal Cases", effective April 1, 1973 (hereinafter "1973 Plan") (Gov A 1), and "The Interim Plan Pursuant to the Provisions of the Speedy Trial Act of 1974 P.L. 93-619", effective September 29, 1975 (hereinafter "1975 Plan") (Gov A 9). After July 1, 1976, the applicable plan was the "Plan for Prompt Disposition of Criminal Cases" (hereinafter "1976 Plan") (Gov A 20). It is the 1976 Plan upon which appellants base all their calculations.

For all relevant purposes here, the 1973 and 1975 Plans are identical, and the pertinent provision states: "In all cases the government must be ready for trial within six months from the



date of . . . the filing of . . . a formal charge . . . ." (Gov A 3, 12). In addition, both Plans provide that in computing the time within which the government should be ready for trial, certain periods should be excluded (Gov A 3, 13). As stated in United States v. New Buffalo Amusement Corp., 600 F.2d 368, 373 (2d Cir. 1979):

The necessary inquiry, therefore, is whether the government was ready for trial within six months after date of indictment, exclusive of any periods of excludable delay.

The 1976 Plan, at paragraph "7" (Gov A 28), similarly requires the Government to be ready for trial within 180 days of the filing of an indictment. However, since the appellants concede that the Government was ready for trial as of June 30, 1976 (J Br. 8), and since the 1976 Plan did not go into effect until July 1, 1976, this Plan is irrelevant to the issue of readiness for trial.

In addition, the 1976 Plan requires that a retrial shall commence within 60 days from the date of the order occasioning the retrial (Gov A 23, 24). The appellants Masciarelli and English contend that this requirement was not met following a mistrial that occurred on November 30, 1976 (J Br. 12). (This aspect of the appeal does not pertain to the appellant McGrath, since the case against him had been severed before the mistrial occurred.)<sup>4</sup>

The "statutory" speedy trial issue, therefore, is two-fold.

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<sup>4</sup> The appellants are not claiming that their cases were not brought to trial within 180 days of July 1, 1976, less excludable periods.



First, with respect to all appellants, was the government "ready for trial" within six months of November 18, 1974, the date of indictment? Second, with respect to appellants Masciarelli and English, was the 60 day retrial requirement met?

(1) THE GOVERNMENT'S READINESS FOR TRIAL

Appellants concede that the Government filed a Notice of Readiness for Trial on December 16, 1974, i.e., 28 days after the indictment was filed. The appellants contend, however, that in fact the Government was not ready for trial until June 30, 1976. Assuming arguendo that this is correct, and that June 30, 1976, is the dispositive date<sup>5</sup>, the Government nevertheless was ready for trial, after excluding periods of excludable delay, within 99 days of indictment, as the following computations reflect:

---

5 In fact, the discovery as required by Judge Port's order was completed at least by May 12, 1976 (J A 78-79). The materials that were forwarded to defense counsel after this date were those that previously were not in the Government's possession (J A 81, 81E-81F) or those that pertained to the "lost" original warrants and inventories (J A 81A-81D). The issue of the "lost" original warrants is, we submit, a red herring. Initially we note that the Clerk of the Court was the custodian of those documents. Secondly, and far more importantly, on May 5, 1976, the Government had provided defense counsel with copies of its file copies of the search warrants, and copies of the underlying affidavit of Roy Hazelwood in support of the search warrants. Despite having the Hazelwood affidavit in their possession, the appellants did not move to suppress, alleging inadequacy of the affidavit, until literally the eve of trial, in November of 1976.



DATESDAYSREASONS

Non-  
Excludable   Excludable

PLAN FOR ACHIEVING PROMPT DISPOSITION OF  
CRIMINAL CASES, Effective April 1, 1973

|                        |     |    |                                                                                                                                                                                                                                                                                                                            |
|------------------------|-----|----|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 11/18/74 -<br>12/10/74 | 22  |    | Rule 5(a): Eleven defendants were indicted on 11/18/74; they were arrested and taken before a Magistrate during the period November 19-25, 1974. The next available day for arraignments in District Court was December 9, 1974. <sup>6</sup> A congested radar caused the arraignments to be held the next day, 12/10/74. |
| 12/11/74 -<br>1/13/75  | 34  |    | Rule 5(a): Pre trial motions pending.                                                                                                                                                                                                                                                                                      |
| 1/14/75 -<br>3/26/75   |     | 72 |                                                                                                                                                                                                                                                                                                                            |
| 3/27/75 -<br>4/21/75   | 26  |    | Rule 5(a): Pre-trial motions pending. Government moves to vacate that portion of Judge Port's order which required pre-trial disclosure of the names of Government witnesses. Motions <u>sub judice</u> April 14-21, 1975.                                                                                                 |
| 4/22/75 -<br>5/ 6/75   |     | 14 |                                                                                                                                                                                                                                                                                                                            |
| 5/ 7/75 -<br>9/28/75   | 144 |    | Rule 5(a): Interlocutory appeal from Judge Port's order requiring pre-trial disclosure of the names of government witnesses; stay of further proceedings. <sup>7</sup>                                                                                                                                                     |

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6 See Rule 10(a), General Rules, United States District Court, Northern District of New York.

7 The Government's opposition to disclosure of the names of its witnesses was not merely a matter of general principle or policy but rather because of a very real concern in the context of this case. In the third count of the Indictment, two defendants (not the appellants herein) were charged with obstruction of justice by beating a grand jury witness. See United States v. Cannone, 528 F.2d 296, 302 (2d Cir. 1975).



DATESDAYSREASONS

Non-  
Excludable   Excludable

THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE  
SPEEDY TRIAL ACT OF 1974 P.L. 93-619,  
Effective September 29, 1975

|                      |                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|----------------------|--------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 9/29/75 -<br>3/24/76 | 177                                              | Rule 6(a): Interlocutory appeal,<br>as described above.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 3/ 2/76 -<br>5/ 4/76 | 42<br>(overlaps 20<br>days with<br>prior period) | Rule 6(b): In open court in Albany<br>before Chief Judge Foley the fol-<br>lowing colloquy occurred:<br>MR. SCACCIA: Your Honor, we<br>respectfully ask these cases be<br>marked over to the Syracuse term.<br>.<br>.<br>.<br>THE COURT: You say that Mr.<br>Chalenski [Assistant U. S. Attor-<br>ney] has no objection to marking<br>these over?<br>MR. DREYER: That's correct, your<br>Honor.<br>THE COURT: I think they should<br>be marked over to Auburn.<br>MR. DREYER: I think Mr. Scaccia<br>meant Auburn.<br>MR. SCACCIA: I asked for Syracuse.<br>THE COURT: No, Auburn is in May,<br>and Judge Port is now taking senior<br>status. He won't be back until<br>mid-April, and he should be fit<br>and ready to start in May in Auburn<br>and try all the cases you have up<br>there. <u>So I will mark the case<br/>over to Auburn and the time will<br/>be excluded, because I assume that<br/>all the attorneys are agreed that<br/>is where these cases should be<br/>tried.</u><br>MR. SCACCIA: <u>I think that is<br/>correct, Judge.</u> (Tr. March 2,<br>1976, pp. 3,4) (emphasis added) |
| 5/ 5/76 -<br>5/12/76 | 7                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 5/13/76 -<br>6/ 1/76 | 19                                               | Rule 6(a): Defendants' suppression<br>motions, including oral argument<br>and hearings before District Judge<br>MacMahon; decision reserved on<br>6/1/76.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |



DATESDAYSREASONS

Excludable      Non-  
Excludable

6/ 1/76 -  
6/30/76

29

Rule 6(a): Motions sub judice.<sup>8</sup>

(2) THE RETRIAL OF MASCIARELLI AND ENGLISH

On November 29, 1976, jury selection commenced in the cases against appellants Masciarelli and English. On the following day, November 30, 1976, before the jury selection was completed, a mistrial was declared, upon the appellants' motions, because certain members of the jury panel apparently had seen a newspaper article pertaining to the trial.

On November 30, 1976, at the time of the application for a mistrial, the following colloquy occurred:

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<sup>8</sup> Although we do not condone the Government's failure to provide the discovery material until May of 1976, the explanation for the delay is as follows. During the investigation and indictment stages, this case was being handled by Assistant U. S. Attorney Eugene Welch. Shortly after Judge Port ruled on the discovery motions on January 13, 1975, Welch contracted infectious hepatitis and was incapacitated until early March. He then directed his attention to overcoming Judge Port's order directing disclosure of the names of Government witnesses. After oral argument of the interlocutory appeal, but before a decision was rendered by this Court, Welch resigned, and the file was re-assigned to Assistant U. S. Attorney Arthur A. Chalenski. At this point in time all other proceedings in the case were stayed by order of Judge Port. Chalenski did not learn until April 29, 1976 that the discovery had not been provided (J A 75). He presumably learned of this on that date when he received copies of letters from defense counsel to Judge Port requesting trial adjournments (J A 73, 74). There is no indication in the record that defense counsel made any request for the discovery materials from April of 1975 through April of 1976.



THE COURT: Have you noted all of the appearances? Also, please note that both Defendants are present.

All right, gentlemen: Mr. Scaccia, and Mr. Avery, I understand that you have a motion to make at this time on behalf of the Defendants?

MR. SCACCIA: If it please the Court, given the developments during the course of the voir dire, both in the open Courtroom and as well as the in camera chambers conference, on behalf of the Defendant Masciarelli, and I understand that Mr. Avery joins with me on behalf of the Defendant English: We now make a motion by way of challenge to the array and move, in the interest of justice, that the case be continued and, of course, we understand and specifically waive any restrictions in the District with respect to any possible requirement involving 60 days or any other such period as outlined in this District.

This is referring specifically to 5, Sub B, which appears to require a retrial within 60 days. In any event, we specifically waive any of our rights, or any such requirements under that section. The District plan is called, the plan for the promptest disposition of criminal cases for the Northern District of New York, and I don't know the effective date, but it is pursuant to the Speedy Trial Act of 1974, Judge.

THE COURT: Mr. Avery, do you join in that motion?

MR. AVERY: I join in that.

THE COURT: Mr. Chalenski?

MR. CHALENSKI: The Government's position as to the challenge to the array: It has no opposition.

There was a request for a continuance, and can you please state the time time (sic) that you requested the continuance to?

MR. AVERY: Subject to the convenience of the Court.



MR. SCACCIA: Yes, subject to the convenience of the Court calendar and the Judge's assignments in this District and, again, more specifically waiving any requirement that we be tried within 60 days.

MR. CHALENSKI: All right, and is that with the understanding that the case has the present stance that it will not be reached prior to January 1, 1977?

MR. SCACCIA: Yes, that is my understanding.

\* \* \* \* \*

THE COURT: \* \* \* \*

\* \* \* \* \*

It does so and also grants the motion for continuance upon the basis that the ends of justice will be served by taking such a continuance, and that the ends of justice outweigh the best interests of the public and the Defendants to have a speedy trial at this time.

It is also taking into consideration the fact that counsel for both Defendants have waived the rules of the Northern District of New York and specifically Rule 5-B, with regard to the speedy trial.

At this time, although it has not been discussed with any counsel, the Court would set this case down for trial in Syracuse on February 14, 1977. (emphasis added)

(Tr. Nov. 30, 1976, pp. 3-6.)

It is clear from the foregoing, we submit, that defense counsel were consenting to a continuance for whatever period would be convenient to the Court.

There was a request for a continuance, and can you please state the time time (sic) that you requested the continuance to?

MR. AVERY: Subject to the convenience of the Court.



MR. SCACCIA: Yes, subject to the convenience of the Court calendar and the Judge's assignments in this District and, again, more specifically waiving any requirement that we be tried within 60 days. (emphasis added)

(Tr. Nov. 30, 1976, p. 4.)

Judge Munson then, without consulting counsel, selected the adjourned date of February 14, 1977.

Judge Munson's reason for selecting the February 14 date was set forth on the record by him on April 27, 1977, at a subsequent hearing on the speedy trial issue:

THE COURT: All right. In that line, Mr. Scaccia, let me state that when we had the mistrial in November, I did set the case down for February 14.

THE COURT: It was later determined that the Court was wrong because that was a motion day, I believe.

MR. SCACCIA: That is right.

THE COURT: So that it was adjourned to the 15th so you are exactly correct in what you say along that line. In the interim, I had been informed that there was a Federal Drug Administration case that was coming in that I had to try that would take approximately four weeks. Now, that was to commence on -- somewhere around the 12th or 13th of January. The reason for setting the 14th or 15th of February as the date for trial in this case for 142 [74-CR-142] was that I thought that that case would be concluded by that time. As you know, it was not, it ran for 10 or 11 weeks . . . . (emphasis added)

(Tr. April 27, 1977, pp. 52-53.)

In other words, if Judge Munson had known on November 30, 1976, that the FDA trial (United States v. Morton-Norwich Products



Inc. et al.) was going to take 10 or 11 weeks, rather than four, he would have adjourned the appellants' trial for at least that full period of time and not merely to February 14. We submit, therefore, that defense counsel, by consenting to a continuance for whatever period would be convenient to the Court and subject to the Judge's assignments<sup>9</sup>, were implicitly consenting to a continuance through the conclusion of the Morton-Norwich trial. This occurred on March 18, 1977.

Beyond the foregoing, we submit that the retrial provision of the 1976 Plan (Rule 5(b)) (Gov A 23) is based upon the premise that all pre-trial proceedings are completed and that there are no impediments to almost an immediate retrial. In the instant case, however, the appellants made new suppression motions on December 6, 1976, after the mistrial of Masciarelli and English had occurred. Hearings on these motions were required, and were held on January 3, 4, 7, and 21, and April 6, 7, and 11. The hearings had to be held in this fashion because the aforementioned FDA trial was proceeding simultaneously. As Judge Munson stated at the hearing on the speedy trial issue:

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9 District Judge Port had become a Senior Judge in February of 1976, and Judge Munson, who succeeded him, did not go on the bench until November 5, 1976. During the nine month hiatus, this geographically huge District had only one active judge (Chief Judge Foley in Albany), while Senior Judge Port maintained a very reduced schedule and often was out of the District. Despite the assistance of visiting judges during this period, the back-log of assignments to be confronted by Judge Munson was substantial. Nevertheless, he immediately addressed himself to the instant case, with court proceedings being held on November 9, 15, 16, 17, 29, and 30 (when the mistrial was declared). As a result his already back-logged caseload became even larger during this period.



. . . at every opportunity that the Court had during the course of that trial when there were commitments of either the Justice Department lawyers or the lawyers for the defense in the Morton Norwich, United States v. Morton Norwich case, we tried to fit in the suppression hearing. I think we did fit it in on one day, something like February 21 or something.

MR. SCACCIA: January 21, Judge.

THE COURT: January. I understand what you are saying, but we did try to slide you in and -- all right, your objection to the delay from that time on is noted, but the fact is that we did not complete the suppression hearing until very recently, April, I think.

MR. SCACCIA: April 6 or 7, thereabouts.

THE COURT: Until the 11th.

(Tr. April 27, 1977, pp. 53-54.)

The hearing was concluded on April 11, 1977, and on that date defense counsel served a brief upon the Government. Judge Munson granted the Government one week, i.e., to April 18, 1977, to respond to the brief. (Tr. April 11, 1977, pp. 53-54.) On April 27, 1977, Judge Munson denied the motions. (Tr. April 27, 1977, p. 49.)

In summary, we respectfully submit that the entire period of time from December 6, 1976 through April 18, 1977, is excludable pursuant to 18 U.S.C. §3161(h)(1)(E). The period from April 18 through April 27, while the motions were under advisement, also is excludable pursuant to §3161(h)(1)(G).<sup>10</sup> (These sections are 3161(h)(1)(F) and 3161(h)(1)(J) respectively under the 1979 amendments to the Speedy Trial Act.)

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<sup>10</sup> The provisions of §3161(h) are applicable to the period of retrial. Rule 10 of the 1976 Plan. See, in addition, Guidelines Under the Speedy Trial Act, adopted by the Speedy Trial Planning Group for the N.D.N.Y., at pages 9-10.



On April 27, 1977, the trial of appellant McGrath was scheduled to commence. It was determined that the trial of appellants Masciarelli and English would begin on May 11, 1977, when a new jury panel would be available. The Government's motion to exclude the period from April 27 through May 11, 1977 was granted. (Tr. April 27, 1977, pp. 58-62.)

However, on April 27, during jury selection, a mistrial in the McGrath case was declared because English's attorney had been conversing with one or more of the prospective jurors (Gov A 70-80). As a result, the McGrath case did not proceed to trial until May 11, and it concluded on May 24. Also, on May 3, 1977, counsel for appellants Masciarelli and English requested that the retrials be stayed pending the resolution of a matter that was on appeal to this Court in a companion case. Judge Munson denied the stay application, but stated that the case would be continued until after the McGrath trial. (Tr. May 3, 1977, pp. 3-6.)

In summary, for all of the foregoing reasons, it is the Government's position that the entire period from November 30, 1976 through May 24, 1977 is excludable. As a result, the retrial of appellants Masciarelli and English, which commenced on June 21, 1977, occurred well within the sixty day period called for under the 1976 Plan.<sup>11</sup>

<sup>11</sup> Assuming arguendo that the Government's computations are not correct and that more than 60 non-excludable days elapsed following the mistrial, dismissal of the indictment still would not be required. Rule 11(e) of the 1976 Plan. Indeed, as stated in United States v. Carini, 562 F.2d 144, 148 (2d Cir. 1977): "... the violation of the Speedy Trial Act is not, in and of itself, a sufficient reason for dismissing the information here." Appellants concede this point (J Br. 8, 9).



B. THE APPELLANTS' SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS NOT VIOLATED.

The controlling criteria in conducting a Sixth Amendment speedy trial analysis were identified by the Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972). Recognizing that the right to a speedy trial is a vague concept, the court in Barker announced an ad hoc balancing test containing four factors which must be examined in determining whether prosecutorial delay has resulted in a Sixth Amendment violation. Those factors include: the length of the delay, the reasons for it, the resulting prejudice to the defendant, and the defendant's assertion of his right to a prompt trial. Barker v. Wingo, supra, at 530. The court expressly noted that no single factor was dispositive and that due regard must be given to the circumstances of each case.

With the Barker criteria as the background for an analysis of the alleged denial of appellants' speedy trial right, the Government respectfully submits:

(1) Length of Delay

Thirty-one months elapsed from the date of indictment to the guilty pleas by Masciarelli and English.\* This period of delay is considerably shorter than that in other cases in which no Sixth Amendment violation was found. See, Barker v. Wingo, supra, at 533 ("well over five years"); United States v. Lane, 561 F.2d

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\* Only twenty-four months elapsed from indictment (November 18, 1974) to trial (November 29, 1976). The November 29, 1976 trial of Masciarelli and English resulted in a mistrial.



1075, 1078 (2d Cir. 1977) ("approximately 58 months or just under five years"); United States v. Saglimbene, 471 F.2d 16, 17 (2d Cir. 1972) (six years).

(2) Reason for Delay

As discussed above, the primary reasons for the delay were as follows:

- a) 11/18/74 - 1/13/75: approximately two months for post-arrest proceedings, District Court arraignments, and pre-trial motions.
- b) 3/27/75 - 3/24/76: approximately one year to resolve, at the District Court level and on appeal, whether the Government would have to disclose the names of its witnesses.
- c) 5/13/76 - 7/14/76: approximately two months for suppression motions before Judge MacMahon; on 7/14/76 a 33 page opinion was rendered.
- d) 9/20/76 - 11/9/76: almost two months because one defense counsel was hospitalized and another was engaged in trial.
- e) 11/15/76 - 12/20/76:<sup>\*</sup> as to appellant McGrath, approximately five weeks because his original counsel, Mr. Scaccia, had to withdraw as the result of a potential conflict in representing two defendants.
- f) 11/30/76 - 3/18/77: approximately 14 weeks because of the declaration of a mistrial.

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\* During this period, Judge Munson was frustrated by a string of untimely motions by defense counsel. (See Gov A 81-82, 84-85, 86-89, 114-118.)



g) 12/21/76 - 4/27/77: over four months for additional suppression motions.

h) 4/27/77 - 5/24/77: approximately one month because of the declaration of a mistrial.

None of the foregoing periods of delay "are attributable either to deliberate procrastination or even negligent inaction on the part of the Government." United States v. Lane, supra, at 1079.

### (3) Assertion of Right

The appellants were timely in asserting their right to a speedy trial.

### (4) Prejudice

In large part, the appellants urge this court to presume actual prejudice from the mere fact and length of the post-indictment delay herein. This court has repeatedly held that the courts will not presume prejudice from the mere fact of delay. United States v. Lane, 561 F.2d 1075, 1079 (2d Cir. 1977); United States v. Stein, 456 F.2d 844, 848 (2d Cir. 1972). The United States Supreme Court has also addressed this contention in dicta:

No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and



evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature. (emphasis supplied)

United States v. Marion, 404 U.S. 307, 325-326 (1971).

Appellants devote a scant page in their brief enumerating the prejudice they allegedly suffered, including: 1) "anxiety and concern suffered by appellants as a result of the pending criminal indictment" (J Br. 16); 2) "accurate memory of . . . the prosecution witnesses was essential to a successful defense. The passage of time and erosion of memory substantially prejudiced appellants" (J Br. 16); 3) "the Government obtained an advantage by the delay: its experts had the advantage of their examination of the consolidated evidence" (J Br. 16); 4) ". . . by the time . . . trial was at hand a consolidated defense was impossible" (J Br. 17).

With respect to the alleged "anxiety and concern" of appellants, it is submitted that such an ephemeral factor, if it existed, is insufficient in itself to substantiate appellants' assertion of prejudice. In Barker, it was conceded that the defendant therein was "prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety." Here, of course, the delay is 24 months, far less than in Barker. Barker v. Wingo, supra, 407 U.S. at 534. However, the Court considered this burden inconsequential since no "actual" prejudice was suffered.



With regard to appellants' contention of dimmed memories, this case was essentially a recorded and documentary evidence case. All the essential evidence was contained in wiretaps which were completed in May of 1974. Appellants had the opportunity and listened to the tapes and, in addition, were provided transcripts of the conversations. Since the FBI investigated, there were extensive written FBI reports prepared at the time which documented the dates, times and places of the events in this case. Appellants' contention about the erosion of memory is completely unsupported.

Further, the assertion that Government experts gained some tactical advantage by the delay, allowing them additional examination time, is both speculative and spurious. Because of the extended discovery period, defense experts had ample access to and time to examine relevant evidence prior to trial.

Finally, the appellants contend as follows:

By dismissal, severance and plea, all but the three appellants had been eliminated from trial and by the time discovery had been substantially completed and trial was at hand, a consolidated defense was impossible.

This contention, we submit, is speculative in the extreme, of questionable logic, and difficult to comprehend. We note, however, that four co-defendants pleaded guilty during November of 1976, the same month that the trial of Masciarelli and English commenced.



We respectfully submit that the foregoing clearly reflects that the appellants' Sixth Amendment right to a speedy trial was not violated.<sup>12</sup>

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12 As appellants note in their brief, this Court previously has stated that a violation of the Speedy Trial Act may "be considered as a factor" in undertaking a Barker balancing test, and it may "tip the scales" in favor of the defendant. United States v. New Buffalo Amusement Corp., supra, at 377. In the instant case, however, there was no Speedy Trial Act violation, as discussed above. In addition, such a violation is an important factor "where the balance is close." Id. We respectfully submit that in the instant case the balance is not close, but instead overwhelmingly favors the Government.



## POINT II

A. THE SEARCH WARRANTS WERE ISSUED BASED ON  
RELIABLE, SUFFICIENTLY RECENT INFORMATION  
TO ESTABLISH PROBABLE CAUSE AND THE EVIDENCE  
SEIZED AS A RESULT SHOULD NOT BE SUPPRESSED

Appellants' challenge to the search warrants in this case is based on the alleged staleness of the information used to determine probable cause. Appellants argue that the excessive time between the existence of probable cause and the issuance of the search warrant invalidates the warrants.

Specifically, appellants contend that the information contained in the affidavit of Special Agent Hazelwood dated June 17, 1974 (J A 149-159) (hereinafter "Hazelwood affidavit") is stale and cannot form the basis for a valid search warrant. They claim that the Hazelwood affidavit used information obtained from wire-taps in March, April and May of 1974.

Judge Munson heard arguments on these suppression issues in November of 1976 and ruled specifically that the Hazelwood affidavit was sufficient and was not based on stale information.

Judge Munson stated on November 29, 1976:

Now, with regard to the motion for suppression of the evidence educed by the warrant: I find myself in some disagreement with the Broome County Court Judge. It may not be that he and I are talking about the same thing. I suspect that he was talking about a motion to suppress the use as evidence of a quantity of marijuana, and that is a little different situation than we have here.



Also, he totally ignored, I think, the statement at the end of Mr. Hazelwood's, the F.B.I. agent's affidavit when he stated in Paragraph 20 of that affidavit that he had some evidence that the business had been conducted as late as June 11th, 1974. The Judge in Broome County continued to talk about 55 days which he related back to April of 1974, and therefore I do not agree with his decision, at least in the indictment that we are concerned with here.

So I would deny that. (emphasis supplied)  
(Gov. A 101-102)

It is important to note that paragraph 20 of the Hazelwood affidavit states that

. . . the gambling business as of June 11, 1974 was still being conducted according to the two confidential sources whose information resulted in the issuance of the wire interception authorizations . . . (emphasis supplied) (J A 159)

Since the search warrants were issued on June 17, 1974, paragraph 20 of the Hazelwood affidavit brings the probable cause to within six days of the issuance of the warrant. The government contends that paragraph 20 of the Hazelwood affidavit shows beyond question that the information used to show probable cause was not stale.

The law on the issue of whether the proof submitted in support of a search warrant is sufficiently related to the warrant "must be determined by the circumstances of each case." Sgro v. United States, 287 U.S. 206, 211, 53 S.Ct. 138, 140 (1932); United States v. DiMuro, 540 F.2d 503, 516 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977); United States v. Dauphinee, 538 F.2d 1, 5 (1st Cir. 1976); United States v. Charest, 602 F.2d 1015, 1018 (1st Cir. 1979).



The determination of staleness depends more on the nature of the unlawful activity alleged in the affidavit than upon the dates and times specified therein. United States v. Harris, 482 F.2d 1115, 1119 (3rd Cir. 1973); United States v. DiMuro, supra, at 516.

In Harris, supra, the court stated:

All the events establishing probable cause will not necessarily occur a few hours or even a few weeks before the affidavit for a search warrant is issued.

\* \* \* \* \*

The issue as to whether or not information in an affidavit is stale must depend on the nature of the activity in question and usually will require review on a case-by-case basis.

482 F.2d at 1119.

Depending, as it must, on the circumstances of each case, courts have upheld search warrants in cases where there were large intervals of time between the observations set forth in the affidavit and the issuance of the warrant. See for example, United States v. Brinklow, 560 F.2d 1003 (10th Cir. 1977) (eleventh-month interval); United States v. Rahn, 511 F.2d 290 (10th Cir. 1975) (one and one-half years).

Appellants fail to consider the nature of the unlawful activity alleged in the Hazelwood affidavit. In United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972), the court noted that

. . . the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit . . .

\* \* \* \* \*



[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

461 F.2d at 287.

See also United States v. Hyde, 574 F.2d 856, 865 (5th Cir. 1978) and United States v. DePalma, 461 F.Supp. 800, 809 (S.D.N.Y. 1978). The case at hand involved a widespread, ongoing, gambling conspiracy that, according to the Hazelwood affidavit and reliable informants, had been in operation since June of 1973 (J A 157-159).

Appellants maintain that no criminal activity was reported at some of the locations in issue after April 25, 1974 and after May 13, 1974 for others. Appellants emphasize further that if criminal activity continued at any of the five locations, it would have been observed and reported in the agent's affidavit (J Br. 28-29). It is not logical, however, to conclude that all gambling activity immediately stopped on March 21, April 25, or May 13, 1974, the dates that the telephone interceptions ended. As shown by Agent Hazelwood's affidavit, defendants had, since June of 1973, been operating a complex, very successful gambling operation, where wagering information was being given and bets were being taken (J A 149-159).

When one considers the size and scope of the criminal activity, the length of time it was ongoing, and the last date gambling activity was observed, the Hazelwood affidavit shows that it was reasonable to conclude that appellants were continuing their gambling business right up to the time of issuance of the warrant.



Finally, it should be noted that courts have held that in an application for a warrant, the magistrate is entitled to exercise his own judgment and common sense regarding probable cause, acting on the entire picture, and "his determination is conclusive in the absence of arbitrariness . . ." (citations omitted). Bastida v. Henderson, 487 F.2d 860, 863 (5th Cir. 1973). See also, United States v. Brinklow, supra, at 1006, which stated that reviewing courts should give deference to determinations of probable cause by issuing magistrates. In the instant case, Judge Port was totally familiar with all the facts surrounding this gambling operation since he had received periodic reports on the results of the wire-taps.

This court has recently held, in a case which challenged the sufficiency of the affidavit used to secure a search warrant, that "the Magistrate was entitled to make reasonable inferences from the facts stated in the affidavit." United States v. Jackstadt, et al., slip op. at p. 1265, No. 79-1290, (2d Cir., Feb. 14, 1980), and that the "magistrate's finding of probable cause is itself a substantial factor tending to uphold the validity of the warrant." United States v. Jackstadt, et al., supra, at 1264.

**B. THE AFFIDAVIT OF SPECIAL AGENT HAZELWOOD  
IS SUFFICIENTLY DETAILED TO ESTABLISH PROBABLE CAUSE**

Appellants assert that the Hazelwood affidavit is conclusory and that it fails to set forth sufficient detail to establish probable cause for the search warrants. For each of the five loca-



tions that were searched, appellants repeat this assertion. Since appellants' arguments are similar or identical with respect to all locations, we will examine appellants' allegations regarding only one location.

With respect to Room 4 of the Vestal Motel, appellants state in their brief:

that Special Agent Hazelwood asserts the bare conclusion that, 'during these calls point information was exchanged between Thomas A. Gaetani and at least three unknown males . . . . Additionally, balances were discussed', but does not set forth the details of the telephone conversations from which the aforementioned conclusion is drawn. It is submitted that only through the disclosure of the content of the calls can an independent judicial authority determine whether or not probable cause exists for the issuance of a search warrant . . . .

Also with regard to the aforementioned telephone calls . . . there is a complete lack of information as to specific dates, times and places and occurrences of these alleged telephone calls. One is left to speculate as to when the alleged transactions took place and how often they took place. (emphasis supplied) (J Br. 30)

These same or similar arguments are made four more times with respect to each of the locations or premises that were searched.

Citing as authority, Nathanson v. United States, 290 U.S. 41, 54 S.Ct. 11 (1933); Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245 (1958); and United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965), appellants maintain that probable cause cannot be based on belief, suspicion or mere conclusion, but that the underlying circumstances upon which the belief is based must be



detailed. The Government agrees with appellants' conclusion and applying the criteria set forth in the cases mentioned, we submit that the Hazelwood affidavit is more than sufficient.

The Hazelwood affidavit is not based on belief, suspicion or conclusion. Hazelwood begins his affidavit by detailing his experience in gambling investigations and his familiarity with illegal betting operations, (J A 149-150). He had studied gambling investigations, talked to other Special Agents who conducted investigations and had personally conducted numerous gambling investigations. Hazelwood then sets forth in great detail the probable cause to believe the appellants, among others, were involved in an illegal gambling operation. Specifically, Hazelwood indicates that he himself listened to every tape recording that was intercepted, and heard conversations in which gambling information was exchanged, layoff bets made, and point information was exchanged (J A 152). Hazelwood states that on numerous occasions, conversations were intercepted taking horse, basketball and baseball wagers, accepting layoff of bets, and exchanging point information and race results (J A 153).

Hazelwood's affidavit details that on several occasions, wagers and layoff balances of bookmakers and betters doing business were overheard (§ 8); point spreads on baseball games were intercepted numerous times (§ 9); and a total of 38 calls were made to Room 4, Vestal Motel, during which point information was exchanged (§ 10). Surveillances of that location by the FBI placed Jon English in that room on at least four occasions as late as May 13, 1974.



Masciarelli and McGrath were intercepted on numerous occasions exchanging point information; discussing the balance of layoff and wagers; giving layoff of wagers; providing point information to various persons; accepting wagers on horse races, basketball and baseball games; and discussing balances of bets or layoffs with numerous persons. The telephone used was located on the first floor of 229 Chenango Street, Binghamton, New York (J A 154-155, ¶ 11 and ¶ 12). Agent Hazelwood's affidavit outlines similar interceptions at 820 Morelando Drive, Endicott, New York and 24 Lisle Street, Binghamton, New York.

From the interceptions, Agent Hazelwood learned that thousands of dollars of wagers were being received each day and that books were kept at the locations (J A 156).

Furthermore, Agent Hazelwood states in paragraph "20":

I have maintained contact with the two reliable confidential sources whose information resulted in the issuance of the above mentioned wire interception authorizations. The information they provided me was verified by these wire interceptions; that is, (with the exception of two people) the people conducting this gambling business as indicated by these sources, were, in fact, overheard conducting this gambling business on the telephones indicated by the sources using codes indicated by the sources. These two sources, who were proved reliable by these wire interceptions, have indicated to me that this gambling business has been conducted since June, 1973, and as of June 11, 1974 is still being conducted. (emphasis supplied)

Id., at 159, paragraph 2.

From all of the above, it was certainly reasonable to conclude



that the fruits of an illegal gambling operation would be found at the locations in question. Viewed in its entirety, the Hazelwood affidavit clearly spells out the required probable cause upon which to issue a search warrant. See Mapp v. Warden, etc., 531 F.2d 1167, 1171 (2d Cir. 1976), and United States v. Jackstadt, et al., No. 79-1290 (2d Cir. Feb. 14, 1980).

In a case relied on by the appellants, Nathanson v. United States, supra, a State judge issued a warrant based on the statement of the affiant that he "has cause to suspect and does believe that certain merchandise . . . is now deposited . . ." at certain premises. Nathanson at 44. The Supreme Court, in ruling that the search warrant was erroneously issued, stated, "But we think nothing [in these statutes] indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances." Id., at 47. Nathanson is inapposite since the affidavit in that case was patently deficient and is not remotely similar to Hazelwood's affidavit. Agent Hazelwood did not have a mere "belief" or "suspicion", but rather had actually heard the intercepted gambling conversations and fully disclosed the supporting facts and circumstances.

In Giordenello v. United States, supra, the arrest warrant was issued solely upon a written complaint sworn to by the arresting officer. After examining the complaint and the criteria of probable cause, the court stated



When the complaint is judged with these considerations in mind it is clear it does not pass muster . . . the complaint contains no affirmative allegations that the affiant spoke with personal knowledge of the matters contained therein; it does not set forth any other sufficient basis upon which a finding of probable cause could be made. Giordenello, supra, at 486.

It is respectfully submitted that one cannot seriously argue that Agent Hazelwood's affidavit is in any way similar to the complaint in Giordenello. Hazelwood's affidavit had both "personal" knowledge and "other sufficient basis" of the ongoing criminal activity upon which a finding of probable cause could be made.

Finally, appellants rely on United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741 (1965), and argue that Hazelwood's affidavit "lacks sufficient detail" when compared with the affidavit that was used and subsequently upheld in Ventresca (J Br. 39). A simple reading of the Hazelwood affidavit shows that it states subjects, dates, times and places in sufficient detail to compare favorably to and is substantially similar to the affidavit in Ventresca. Moreover, when reviewing the affidavit, the court in Ventresca stated

affidavits for search warrants such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. (emphasis supplied)

Ventresca, supra, at 108, 85 S.Ct. at 746.

Thus, not only is appellants' reliance upon Nathanson, Giordenello,



and Ventresca misplaced, but these holdings illustrate a probable cause standard clearly met by the facts of the instant case.

Furthermore, in this regard, the landmark holdings of Draper v. United States, 358 U.S. 307 (1959), Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1968) serve as appropriate benchmarks herein. These Supreme Court holdings stand for the proposition that

In dealing with probable cause . . . as the very name implies, we deal with probabilities . . . Probable cause exists where the facts and circumstances within the [searching and seizing] officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that [the items sought are in a certain location].

Draper, supra, at 313. (citations omitted)

The facts and circumstances of the case at bar indicate that Hazelwood possessed both personal knowledge of information contained in his affidavit and that other "reasonably trustworthy information" provided by informants was properly verified. In light of this and the aforementioned cases and facts, it is respectfully submitted there was sufficient detail in Special Agent Hazelwood's affidavit upon which to conclude that probable cause existed and that the search warrant was properly issued.



POINT III

THE DELAY IN SEALING THE TAPES WAS  
SATISFACTORILY EXPLAINED AS REQUIRED BY  
18 U.S.C. §2518(8)(a) AND DEFENDANTS' MOTION  
TO SUPPRESS WAS, THEREFORE, PROPERLY DENIED

As summarized by appellants, tapes MP-15, MP-16 and MP-17 were sealed by order of the District Court at times ranging from three to eight days after the orders authorizing the wiretaps had expired (J Br. 45).<sup>13</sup> Before trial, defendants moved to suppress the tapes of the overheard conversations on the ground, inter alia, that the tapes had not been timely sealed as required by 18 U.S.C. §2518(8)(a) (J A 162). A protracted hearing<sup>14</sup> was held on defendants' motion, after which the District Court denied the motion (J A 162). Appellants now appeal from that denial of their motion to suppress. For the reasons which follow, appellants' argument in this regard must fail.

Title 18, United States Code, Section 2518(8)(a) provides in pertinent part:

Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions . . . . .

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13 The Government accepts appellants' statement as to the duration of the delays.

14 The evidentiary hearings on this limited issue consumed seven days and spanned three months (January 3 - April 11, 1977), despite Judge Munson's efforts to expedite them (Gov A 57-59).



. . . . . The presence of the seal  
. . . , or a satisfactory explanation for the  
absence thereof, shall be a prerequisite for  
the use or disclosure of the contents of any  
wire or oral communication [as evidence in any  
proceeding]. (emphasis supplied)

In United States v. Gigante, supra, this court interpreted Section 2518(8) (a) to require a satisfactory explanation, upon penalty of suppression, not only where there is a total failure to seal tapes but also where tapes are not sealed "immediately". Cases decided after Gigante held that sealings performed more than one or two days after expiration of a wiretap are not "immediate" and require explanation. United States v. Vazquez, 605 F.2d 1269, 1278 (2d Cir. 1979); see also, United States v. Sotomayor, 592 F.2d 1219, 1221 (2d Cir.), cert. denied, 99 S.Ct. 2842 (June 4, 1979).

No clear consensus has yet developed as to what constitutes a "satisfactory explanation" under Section 2518(8) (a). Vazquez, supra, at 1278. Various factors have been considered, however. These include the length of the delay, United States v. Scafidi, 564 F.2d 633, 641 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978); Gigante, supra, at 507; whether there existed any evidence of tampering with the tapes, Vazquez, supra, at 1279-80; United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972); United States v. Aloï, 449 F.Supp. 698, 727 (E.D.N.Y. 1977); the time required to duplicate, label, check and prepare the tapes for sealing; Vazquez, supra; United States v. Ricco, 421 F.Supp. 401, 408 (S.D.N.Y. 1976), aff'd, 566 F.2d 433 (2d Cir. 1977), cert. denied, 436 U.S. 926 (1978); United States



v. Caruso, 415 F.Supp. 847, 850 (S.D.N.Y. 1976), aff'd, 553 F.2d 94 (2d Cir. 1977); whether the Government evidenced bad faith, Vazquez, supra; Scafidi, supra; and whether the defendants were prejudiced by the delay, Vazquez, supra; Scafidi, supra; Aloi, supra, at 727; Caruso, supra, at 850.

Here, the delays in sealing were brief, ranging from three to eight days. See, Scafidi, supra, at 641 (seven days a "short" delay); see also, Vazquez, supra, at 1280, and cases cited therein. Two days were required to process each set of tapes for sealing and each period of delay included one weekend. Moreover, there was no evidence of tampering with the tapes or of bad faith by the Government or that the defendants were in any way prejudiced by the delays.<sup>15</sup> Finally, it was reasonably necessary to transport the tapes from Binghamton to the FBI field office in Albany, with its superior facilities and manpower, for duplication and processing before taking them to Judge Port in Auburn for sealing.

Given these reasons, then, the delays of three to eight days in sealing the tapes were reasonable and were satisfactorily explained as required by 18 U.S.C. §2518(8)(a). The district court properly denied the defendants' motion to suppress on that

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<sup>15</sup> The Government produced as witnesses at the suppression hearing all persons who had possession or custody of the tapes from the termination of the interceptions to the sealing of the tapes. All such persons were employees of the FBI. Their testimony, taken together, establishes that during such period of time, no persons other than the witnesses handled the tapes, and that while the tapes were in their physical possession or custody, the tapes were not altered in any manner. Appellants have not contended otherwise.



ground. There is ample support for that ruling in the record of the case.<sup>16</sup> The ruling should, therefore, be affirmed.

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16 As stated in a footnote at page 47 of appellants' brief, the District Court, in denying the motion, did not "state its essential findings on the record." Rule 12(e), F.R.Crim.P. Appellants do not contend, however, nor should they, that such constitutes reversible error. There is no serious dispute as to the facts, which are fully set forth in the record of the hearing.

FBI agents testified that the conversations were intercepted and recorded at Binghamton, New York. There were no facilities in Binghamton for duplication. Upon termination of the wiretap the tapes of the overheard conversations were transported to the FBI headquarters in Albany, a distance of approximately 150 miles, where facilities and manpower were available to duplicate, label, check and prepare the tapes for sealing (Gov A 119-128). In each case, two days were required to process the tapes for sealing (Gov A 129-130) and in each case, the period of delay included one weekend (Gov A 131-139). As the process was completed with each set of tapes, they were transported to Auburn, New York, a distance of approximately 180 miles, where they were sealed under order of Judge Port, the judge who issued the authorization orders (J A 151). By denying the motion, Judge Munson clearly found that the foregoing facts constituted a "satisfactory explanation" of the delay.



POINT IV

IT WAS NOT ERROR FOR THE TRIAL JUDGE TO  
PERMIT THE GOVERNMENT TO PLAY FOR THE JURY  
PORTIONS OF TAPED INTERCEPTED CONVERSATIONS

This point on appeal is raised separately by the appellant McGrath, who was the only defendant whose conviction followed a trial.

At McGrath's trial, numerous tapes of intercepted telephone calls were received in evidence. Some of these were "composite" tapes, i.e., a single tape recording made by the Government from a number of tapes or from a number of separately recorded conversations. Although the entire tapes were received in evidence, only portions were played for the jury by the Government as part of its case in chief.

When the Government first proposed to proceed in this fashion, defense counsel objected as follows:

MR. SHANAHAN: I'd like to object to the selectivity by counsel.

ASSISTANT U.S. ATTORNEY: Defense counsel wants me to play the whole tape.

THE COURT: The only two other alternatives we have is not to play the tapes at all or to play the whole thing.

MR. SHANAHAN: I would regard (sic-request) the former.

THE COURT: Overruled.



Defense counsel pursued his argument no further, nor did the court make any additional statements on this subject. Nevertheless, at page 52 of his brief, the appellant quotes the trial judge as saying "we could not play the whole thing." In the next paragraph the appellant similarly states: "[the trial judge] ruled that the entire tape would not be played." In fact, there is no such statement or ruling by the trial judge, or even words to this effect, at page 165 of the Appellants' Joint Appendix or anywhere else in the entire trial transcript.

Similarly, at page 53 of his brief, the appellant states: "Certainly judicial economy can be promoted in ways other than by restricting defense counsel from going forward and playing a tape or tapes selected by the prosecution in their entirety." (Emphasis supplied.) But this never happened. The appellant chose not to go forward, but rather rested at the conclusion of the Government's case. All of the tapes were in evidence; obviously as part of his defense the appellant could have played for the jury those portions which he felt were exculpatory. In addition, defense counsel in his summation could have directed the jury's attention to any such portions. Neither procedure was followed by appellant.

Finally, the colloquy quoted above indicates that defense counsel's actual request was not that the entire tapes be played for the jury. Rather his position, as ultimately articulated to the court, was "not to play the tapes at all." There was no basis for such a position, nor did defense counsel even attempt to state one.



In United States v. DiMuro, 540 F.2d 503, 511-512 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977), the First Circuit stated:

Appellants also claim it was improper for the trial court to allow the Government to introduce a composite tape containing only those conversations which it wanted to play for the jury at trial. They further contend that the Government's presentation of only twenty-five out of a total of 668 intercepted gambling conversations was inherently unfair because it left "an inescapable impression that the [composite trial tape] was merely a sampling of what constituted continuous dealings among the defendants." However, these claims cannot prevail. The admissibility of recordings of intercepted conversations or parts thereof is a matter committed to the sound discretion of the trial court. . . . . (citations omitted) . . . . And the use of a composite trial tape of particular intercepted conversations which the Government considered relevant to the trial has been permitted. . . . (citation omitted) . . . . In the present case, appellants concede that the entire corpus of intercepted conversations, involving fourteen reels of tape "were replete with gambling conversations . . .," and we see no basis for a claim that the Government was required to present to the jury every conversation intercepted pursuant to a court authorized wire interception order. Moreover, while there could be circumstances where selectivity in the preparation of a composite trial tape might be prejudicial, here appellants had access to the original tapes and were given ample opportunity on cross-examination to bring out the total number of intercepted conversations in which each appellant was personally involved. (emphasis supplied)

Similarly, in United States v. Phillips, 577 F.2d 495, 501 (9th Cir. 1978), the Ninth Circuit stated:

Phillips contends that the district court erred in refusing to require the tapes of con-



versations between Smith and appellants to be played in full. Phillips recognizes that invocation of this so-called rule of completeness is subject to the requirement that the proffered evidence be relevant. See United States v. McCorkle, 511 F.2d 482, 487 (7th Cir. 1975). The record shows Phillips argued the general relevance of the tapes without specifying portions or passages. Given this failure, the district court's ruling was within its discretion.

Finally, in his treatise, Judge Weinstein states:

If a showing is made that introduction of a part of the tape recording would produce a distorted impression, the discretion of the trial judge to require the whole from the proponent should be exercised.

1 Weinstein's Evidence, at 106-11.

In the instant case, defense counsel did not even attempt to argue before the trial court that a distorted impression might be created by permitting the Government to play selected portions. He not only failed to specify those omitted conversations which he felt should be played, but he also did not even make an argument of general relevance.<sup>17</sup> Significantly, even in his brief, the appellant does not specify what it is from the omitted portions of the tapes that he feels would have been relevant and

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<sup>17</sup> Rather amazingly, the appellant in his brief seems to suggest that the trial judge, without any assistance or guidance from defense counsel as to the relevance of the omitted portions, was obliged to review the entire transcript, apparently on his own.



exculpatory.<sup>18</sup> In short, the trial court's ruling clearly was within its discretion.

#### CONCLUSION

Based upon all of the foregoing, the verdict and judgments of conviction should be affirmed.

Dated: March 10, 1980

Respectfully submitted,

GEORGE H. LOWE  
United States Attorney  
Northern District of New York  
Attorney for Appellee  
369 Federal Building  
Syracuse, New York 13260  
(315) 423-5165  
FTS 950-5165

GUSTAVE J. DI BIANCO  
Assistant United States Attorney  
Of Counsel

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18 We are at a loss to understand the significance of appellant's argument, made at pages 50 and 51 of his brief, that at a pretrial hearing on November 15, 1976, six months prior to trial, McGrath's former attorney advised the court that

. . . McGrath indicated [to counsel] that he, McGrath, was not a bookmaker, and did not have a portion of the profits of any bookmaking operation, and did not realize any profits therefrom . . . .



ADDENDUM



COMPUTATION OF TIME

Various Northern District Plans

| <u>Date</u>                                                                                 | <u>Days</u>                                                                                                                                                                                                                    | <u>Category</u> |
|---------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------|
| <u>PLAN FOR ACHIEVING PROMPT DISPOSITION OF<br/>CRIMINAL CASES, Effective April 1, 1973</u> |                                                                                                                                                                                                                                |                 |
| 11/18/74-12/10/74                                                                           | 22                                                                                                                                                                                                                             | Excludable      |
| <u>Reason:</u>                                                                              | Rule 5(a) - "Period of delay while proceedings concerning the defendant are pending." The first available motion day for arraignment was Monday, December 9, 1974. A crowded calendar caused arraignment on December 10, 1974. |                 |
| 12/10/74-1/13/75                                                                            | 34                                                                                                                                                                                                                             | Excludable      |
| <u>Reason:</u>                                                                              | Rule 5(a) - Pretrial motions pending.                                                                                                                                                                                          |                 |
| 1/14/75-3/4/75                                                                              | 49                                                                                                                                                                                                                             | Non-excludable  |
| <u>Reason:</u>                                                                              | Government attorney ill with infectious hepatitis. Government fails to complete discovery.                                                                                                                                     |                 |
| 3/4/75-5/4/75                                                                               | 61                                                                                                                                                                                                                             | Excludable      |
| <u>Reason:</u>                                                                              | Rule 5(b) - Defense request that case be put over to May-June trial term.                                                                                                                                                      |                 |
| 5/5/75-5/7/75                                                                               | 3                                                                                                                                                                                                                              | Non-excludable  |
| 5/7/75-9/28/75                                                                              | 144                                                                                                                                                                                                                            | Excludable      |
| <u>Reason:</u>                                                                              | Rule 5(a) - Interlocutory appeal to Second Circuit. Also, Rule 6(b) since defense counsel consented to stay of proceedings pending appeal (Gov A 35).                                                                          |                 |
| <u>Totals</u>                                                                               | 261                                                                                                                                                                                                                            | Excludable      |
|                                                                                             | 52                                                                                                                                                                                                                             | Non-excludable  |

THE INTERIM PLAN PURSUANT TO THE PROVISIONS OF THE  
SPEEDY TRIAL ACT OF 1974, Effective September 29, 1975

|                 |                                                                                                                                                            |            |                                     |
|-----------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|-------------------------------------|
| 9/29/75-3/24/76 | 177                                                                                                                                                        | Excludable |                                     |
| <u>Reason:</u>  | Rule 5(a) - Interlocutory appeal to Second Circuit. Also, Rule 6(b) since defense counsel consented to stay of proceedings pending appeal (Gov A 35).      |            |                                     |
| 3/2/76-5/4/76   | 42*                                                                                                                                                        | Excludable | *Overlaps 20 days with prior period |
| <u>Reason:</u>  | Rule 6(b) - Defense request that case be removed from Albany trial calendar. Judge Foley makes a specific ruling that this time is excluded (Gov A 36-38). |            |                                     |



# COMPUTATION OF TIME - Various N.D. Plans

| <u>Date</u>                                                                                                                                                                                                                           | <u>Days</u> | <u>Category</u> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|-----------------|
| <p>motion for continuance ". . . in the [interests] of justice". Judge Munson grants a continuance to February 14, 1977. Defense counsel do not object to the February 14, 1977 date.</p>                                             |             |                 |
| 12/21/76-1/21/77                                                                                                                                                                                                                      | 31          | Excludable      |
| <p><u>Reason:</u> Defense motions for suppression and hearings. Hearings held on January 3, 4, 7, 10 and 21, 1977. Also, defense counsel <u>consent</u> to continuance to February 14, 1977. 18 USC §3161(h)(1)(E) and (h)(8)(A).</p> |             |                 |
| 1/22/77-2/14/77 <sup>1</sup>                                                                                                                                                                                                          | 24          | Excludable      |
| <p><u>Reason:</u> 18 USC §3161(h)(1)(E). The evidentiary hearings requested by defense counsel were incomplete. Also, 18 USC §3161(h)(8)(A) since defense counsel <u>consent</u> to continuance to February 14, 1977.</p>             |             |                 |
| 2/14/77-3/1/77                                                                                                                                                                                                                        | 14          | Excludable      |
| <p><u>Reason:</u> 18 USC §3161(h)(1)(E). The evidentiary hearings requested by defense counsel were incomplete.</p>                                                                                                                   |             |                 |
| 3/1/77-4/5/77                                                                                                                                                                                                                         | 36          | Excludable      |
| <p><u>Reason:</u> 18 USC §3161(h)(1)(E) and (h)(8)(A). On March 1, 1977, Judge Foley made a specific finding that this period was excluded under §3161(h)(8)(A).</p>                                                                  |             |                 |
| 4/6/77-4/11/77                                                                                                                                                                                                                        | 6           | Excludable      |
| <p><u>Reason:</u> 18 USC §3161(h)(1)(E). Continuation of defense requested hearing on pretrial motions.</p>                                                                                                                           |             |                 |
| 4/11/77-4/18/77                                                                                                                                                                                                                       | 7           | Excludable      |
| <p><u>Reason:</u> 18 USC §3161(h)(1)(E). On April 11, 1977 defense counsel Scaccia made and served a motion. Judge Munson gave the Government one week to respond.</p>                                                                |             |                 |
| 4/18/77-4/27/77                                                                                                                                                                                                                       | 9           | Excludable      |
| <p><u>Reason:</u> 18 USC §3161(h)(1)(G). On April 11, 1977 Judge Munson said he will decide the motions "on or before the 27th of April".</p>                                                                                         |             |                 |
| 4/27/77-5/11/77 <sup>2</sup>                                                                                                                                                                                                          | 14          | Excludable      |
| <p><u>Reason:</u> Under 18 USC §3161(h)(1)(G) the 30 day period during which motions are "under advisement" is excludable.</p>                                                                                                        |             |                 |
| 5/11/77-6/21/77                                                                                                                                                                                                                       | 30          | Non-excludable  |



COMPUTATION OF TIME - Various N.D. Plans

| <u>Date</u>                                                                                                                                                                              | <u>Days</u> | <u>Category</u> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|-----------------|
| 5/4/76-5/12/76                                                                                                                                                                           | 8           | Non-excludable  |
| 5/13/76-5/24/76                                                                                                                                                                          | 11          | Excludable      |
| <u>Reason:</u> Rule 6(a) - Defense motions for suppression, returnable May 24, 1976 at Utica, New York.                                                                                  |             |                 |
| 5/24/76-6/1/76                                                                                                                                                                           | 8           | Excludable      |
| <u>Reason:</u> Rule 6(a) - Defense motions for suppression and hearings. Hearing begins on May 28, 1976 before Hon. Lloyd F. MacMahon in Auburn, New York and continues on June 1, 1976. |             |                 |
| 6/1/76-6/30/76                                                                                                                                                                           | 44          | Excludable      |
| <u>Reason:</u> Rule 6(a) - Motions <u>sub judice</u> since Judge MacMahon reserved decision on June 1, 1976.                                                                             |             |                 |
| <u>Totals</u>                                                                                                                                                                            | 282         | Excludable      |
|                                                                                                                                                                                          | 8           | Non-excludable  |

PLAN FOR PROMPT DISPOSITION OF  
CRIMINAL CASES, Effective July 1, 1976

|                                                                                                                                                                                                                                                                                                                                                                                                             |    |                |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|----------------|
| 7/1/76-7/14/76                                                                                                                                                                                                                                                                                                                                                                                              | 14 | Excludable     |
| <u>Reason:</u> Rule 6(a) - Motions <u>sub judice</u> since Judge MacMahon reserved decision on June 1, 1976. 18 USC §3161(h)(1)(G)                                                                                                                                                                                                                                                                          |    |                |
| 7/14/76-9/20/76                                                                                                                                                                                                                                                                                                                                                                                             | 66 | Non-excludable |
| <u>Reason:</u> No trial terms available in N.D.N.Y.                                                                                                                                                                                                                                                                                                                                                         |    |                |
| 9/20/76-11/9/76                                                                                                                                                                                                                                                                                                                                                                                             | 49 | Excludable     |
| <u>Reason:</u> Rule 10 - 18 USC §3161(h)(8)(A) - Defense counsel unavailable. Attorney Scaccia is hospitalized and attorney Boreanaz is engaged in trial. Judge Port grants continuance "in the interests of justice" (Gov A 39-41).                                                                                                                                                                        |    |                |
| 11/9/76-11/29/76                                                                                                                                                                                                                                                                                                                                                                                            | 20 | Non-excludable |
| 11/30/76-12/20/76                                                                                                                                                                                                                                                                                                                                                                                           | 20 | Excludable     |
| <u>Reason:</u> On November 30, 1976, a mistrial was declared against English and Masciarelli because of misconduct of a prospective juror which affected the entire panel. Counsel for Masciarelli and English request "... that the case be continued ... and specifically waive any requirement ... that we be retried within 60 days." (Tr. November 30, 1976, pp. 3,4.) Judge Munson grants defendants' |    |                |



COMPUTATION OF TIME - Various N.D. Plans

| <u>Date</u>                             | <u>Days</u> | <u>Category</u> |
|-----------------------------------------|-------------|-----------------|
| <u>Reason:</u> Delay before trial date. |             |                 |
| <u>Totals</u> <sup>3</sup>              |             |                 |
|                                         | 224         | Excludable      |
|                                         | 116         | Non-excludable  |

1. During the period of January through March, 1977, Judge Munson was presiding over a lengthy criminal trial, United States v. Morton Norwich, et al., 75-CR-114. Trial was held on January 5, 13, 14, 17, 18, 19, 20, 25, 26, 27, 28 and 31; February 1, 2, 3, 4, 7, 8, 9, 11, 15, 17, 18, 22, 23, and 24; March 1, 7, 8, 9, 10, 11, 14, 15, 16 and 18, 1977. The Clerk calculated and stated that the entire period March 1, 1977 to May 3, 1977 is excluded under 18 U.S.C. §3161(h)(8)(A) because of a continuance in the interests of justice (J A 145).

2. On May 3, 1977, defense counsel requested a continuance of this case until after the completion of the pending appeal in the companion case 74-CR-144. The Government strenuously opposed this defense motion which Judge Munson denied.

3. The total time between July 1, 1976 and November 29, 1976, the first trial date for Masciarelli and English, is 152 days. Since 63 days are excludable from this period, Masciarelli and English received a trial within 89 days from July 1, 1976. This complies with Rule 5 of the 1976 Plan (Gov A 23).

On November 30, 1976 Masciarelli and English specifically waived any rights to a retrial within 60 days under Rule 5(b) of the 1976 Plan (Tr. November 30, 1976, pp. 3, 4). Appellants do not mention this on page 9 of the Joint Brief but do refer to the waiver on page 12.

The total time between July 1, 1976 and June 21, 1977, the second trial date for Masciarelli and English is 356 days. Since 238 days are excludable from this period, Masciarelli and English actually went to trial within 118 days from July 1, 1976. This complies with Rule 5 of the 1976 Plan (Gov A 23).

4. McGrath's trial was scheduled to commence on April 27, 1977 (mistrial). The trial actually began on May 11, 1977. Since McGrath's new counsel requested a 35 day continuance on November 15, 1976 and McGrath proceeded to trial before Masciarelli and English, the delay for McGrath is obviously less than the delay for Masciarelli and English. For this reason we have not calculated the actual number of days of delay for McGrath.



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Attorney(s) for **Appellee**

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**Attorney At Law**  
**522 University Building**  
**Syracuse, New York 13202**

**Charles W. Avery, Esq.**  
**Attorney At Law**  
**133 Genesee Street**  
**Auburn, New York 13021**

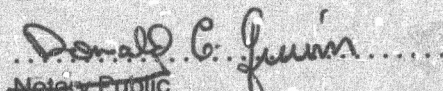
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**Suite 300 Wilson Building**  
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.....  
Notary Public  
Commissioner of Deeds

cc: **Gustave J. DiBianco, Esq.**  
**Assistant U. S. Attorney**